No. 93-850

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

LUIS HIRAM ORTIZ-CAMERON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court conducted a sufficient inquiry into alleged juror misconduct.

2. Whether the district court, in questioning jurors about the alleged juror misconduct, misled jurors concerning the burden of proof in a criminal trial.

3. Whether a government witness's in-court identification of petitioner was tainted by pretrial exposure to an impermissibly suggestive identification procedure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A60) is reported at 996 F.2d 436.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. The petition for rehearing was denied on August 27, 1993. Pet. App. A61-A62. The petition for a writ of certiorari was filed on November 26, 1993 (the day after a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of conspiring to possess marijuana and cocaine with the intent to distribute those substances, in violation of 21 U.S.C. 846; importing cocaine, in violation of 21 U.S.C. 952; and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 25 years in prison, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A60.

1. Between 1985 and 1988, an organization known as La Nena imported large quantities of marijuana and cocaine from South America into the United States. On February 26, 1988, two private airplanes carrying 985 kilograms of cocaine crash-landed at a clandestine airfield in Puerto Rico. After salvaging the cargo, Geraldo Portalatin Toledo and others transferred the cocaine to a waiting truck. Petitioner, accompanied by Portalatin and two others, drove the truck with the cocaine to petitioner's house, a two-hour drive. When they arrived, petitioner, Portalatin, and two other men transferred the cocaine to another truck. Petitioner stayed at the house while the others transported the cocaine in the second truck. Gov't C.A. Br. 5-6, 25; Pet. App. A7-A8.

2. At trial, Portalatin testified that the driver of the truck that was used to transport the cocaine after the airplane crash was "Hiram," whom he identified as petitioner. While cross-examining Portalatin, counsel for petitioner learned that government agents had shown Portalatin a photograph of an

unidentified individual at his debriefing. Portalatin had immediately identified petitioner from the photograph—saying, "That's Hiram." The picture was not part of a photo spread and was shown to Portalatin in the course of a discussion concerning his participation in various drug transactions. Based on those circumstances, petitioner moved to strike Portalatin's identification testimony. The district court denied the motion. Pet. App. A8-A10.

At the close of the government's case, the district court was advised that a juror's daughter, who had been accompanying her mother to court each day, had been observed in lengthy conversation with a woman identified as petitioner's girlfriend. The district court interviewed the juror and her daughter. The interviews disclosed that the juror had discussed the case with her daughter and had expressed very definite views about the testimony of the government witnesses. The daughter also reported that her mother had indicated that the jurors had discussed the case among themselves. Her mother denied that she had talked with other jurors about the case. The court segregated that juror from the others and later excused her from the jury. Pet. App. A23-A24, A31.

The court then summoned all of the jurors individually into chambers and asked them (1) whether they had discussed the guilt or innocence of the defendants with the other jurors or anyone else; (2) whether they had discussed the defendants' reputations with other jurors or anyone else; (3) whether they had discussed the defendants' credibility with the other jurors or anyone else; and (4) whether they had reached a decision regarding the defendants' guilt or innocence. Pet. App. A24-A25.

All but one of the jurors answered "no" to the first three questions. Only one juror stated that there had been any discussion of the case, relating to witness credibility. And he merely reported that "it is hard for me to say yes or no because yes, we made comments between us but nothing that I can say yes or no." C.A. App. 137-138. Four jurors answered "yes" to the fourth question, indicating that they had reached a decision regarding the defendants' guilt or innocence. Pet. App. A25.

The court then recalled those four jurors, one at a time, and addressed each one as follows:

> As I instructed you before, the guilt or innocence of the defendants is decided after listening to all the evidence, to the final summations of the attorneys and after applying the instructions as to the law to be given by me.
>
> And my question is, would you be able to keep an open mind and in the course of your deliberations with your fellow jurors, reexamine your own views and change your opinion if convinced it is erroneous?

All four of the jurors answered "yes." Based on their answers and demeanor, the court found that the jurors could render a "just and impartial verdict." Pet. App. A25-A26; C.A. App. 160.

3. On appeal, petitioner argued that the out-of-court photographic identification procedure resulting in Portalatin's identification of petitioner was impermissibly suggestive. Relying on *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), the court of appeals explained that "[t]he reliability of identification testimony allegedly tainted by reason of an impermissi-

bly suggestive photograph should be resolved after consideration of all the circumstances." Pet. App. A10-A11. Because Portalatin had spent more than two hours driving with petitioner in Puerto Rico and spontaneously stated petitioner's name upon seeing the photograph, the court concluded that the in-court identification was reliable. *Id.* at A11-A12.

Moreover, the court of appeals determined that "[t]he trial court conducted an adequate investigation into the alleged misconduct and reached a reasonable conclusion about the jurors' impartiality." Pet. App. A32. In so doing, the court of appeals emphasized that the district court reached its conclusion only after "interviewing all the jurors and relevant third parties, consulting with counsel, and weighing the testimony, demeanor, and credibility of the various parties." *Ibid.*

Finally, petitioner alleged that the district court impermissibly shifted the burden of proof to the defense when it asked the four jurors whether they would be able to "keep an open mind" and "change [their] opinion if convinced it [was] erroneous." Pet. App. A26. The court of appeals found that the trial court's question "did not place the burden of proof on any specific party but merely asked whether the jurors retained the ability to re-examine their views in light of further developments." *Id.* at A34-A35. Moreover, the court noted that the trial judge "scrupulously avoided indicating what particular views he thought the jurors possessed and instead referred only to the jurors' ability to change their 'opinion,' whatever it might be." *Id.* at A35. The court noted that defense counsel had failed to propose "a sound alternative instruction," and that any

"slight ambiguity" in the trial court's question was dispelled by its instructions on the government's burden of proof and its instruction to the jury to disregard anything but the court's instructions during deliberations. *Id.* at A35-A37.[1]

ARGUMENT

1. Petitioner renews his contention (Pet. 22-35) that the district court inadequately investigated the allegation that the jurors discussed the case among themselves during trial. A district court has broad discretion to determine the type of investigation to conduct in response to a claim of juror misconduct. See, *e.g.*, *United States* v. *Resko*, 3 F.3d 684, 690 (3d Cir. 1993); *United States* v. *Boylan*, 898 F.2d 230, 258 (1st Cir.), cert. denied, 498 U.S. 849 (1990). In undertaking its inquiry, the trial court is in a "superior position to observe the 'mood at trial and the predilections of the jury.'" *United States* v. *Resko*, 3 F.3d at 690 (quoting *United States* v. *Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979)).

In this case, the district court immediately segregated and then excused the juror who had discussed the case with her daughter. The court then interviewed the remaining jurors individually to determine whether they had discussed the guilt or innocence of the defendants, the defendants' reputation, or the

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[1] Judge Stahl dissented, asserting that the district court's inquiry into possible juror misconduct effectively "shift[ed] the burden of proof from the government to the defendants," Pet. App. A41, and that the trial court had not conducted an adequate investigation into whether the jurors had improperly discussed the case, *id.* at A58-A59 n.9.

credibility of the witnesses. In response to those questions, one juror gave an "extremely indefinite" (Pet. App. A33 n.2) answer indicating that he thought that he had heard comments about credibility, but could not recall the substance of them. See C.A. App. 137. None of the other remaining jurors stated that there had been discussion of the case.

The trial court also asked each juror whether he or she had reached a decision in the case. After four jurors indicated that they had, the district court called them individually into chambers and directed them to withhold any decision until the end of the trial. The court asked whether the jurors could reexamine and change their opinions, to which each juror responded "yes." The court of appeals correctly determined that that investigation was adequate to support the trial court's finding that there was no misconduct affecting any juror's ability to render a fair and impartial verdict.[2]

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[2] Petitioner argues (Pet. 27-35) that the district court should have asked more probing questions of that juror. The court, however, did not abuse its discretion in determining that any such comment was immaterial. All of the other jurors denied that any discussion had occurred; the juror who reported discussion of credibility denied that there had been any discussion of the defendants' guilt or innocence or of their reputations; and that juror was vague in his recollection of any comment on credibility. Moreover, the court ascertained from the four jurors who had formed an opinion on the case that they would be able to reexamine and revise their opinions in light of all of the evidence. Thus, the court had a firm basis for concluding that the jurors were able to render a fair and impartial verdict. See *United States* v. *Klee*, 494 F.2d 394, 396 (9th Cir.) ("The important thing is not that jurors keep silent with each other about the case but that each juror keep an open

Petitioner relies (Pet. 23-24) on *Remmer* v. *United States*, 347 U.S. 227 (1954), and *Smith* v. *Phillips*, 455 U.S. 209 (1982), for the proposition that the trial court should have conducted a full-blown hearing to examine whether there was prejudicial jury misconduct. In contrast with this case, however, those decisions involved the impact of external influences on jury deliberations. See *Remmer*, 347 U.S. at 228 (reported attempt to bribe juror); *Phillips*, 455 U.S. at 212 (juror applied for employment with the prosecution during the trial).[3] "It is well-established that [external influences] pose a far more serious threat to a defendant's right to be tried by an impartial jury." *Resko*, 3 F.3d at 690. As one court of appeals has explained, "extra-record influences pose a substantial threat to the fairness of the criminal proceeding because the extraneous information completely evades the safeguards of the judicial process." *Ibid.* In contrast, where, as here, the allegation of jury misconduct relates to premature deliberations, "the proper *process* for jury decisionmaking has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." *Ibid.* In both types of cases, moreover, the district court has discretion to determine how to deal with allegations of juror misconduct. *Ibid.*

Petitioner errs (Pet. 26) in alleging that the decision in this case conflicts with *United States* v.

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mind until the case has been submitted to the jury."), cert. denied, 419 U.S. 835 (1974).

[3] As petitioner concedes (Pet. 25), his allegations relate to alleged *intra*-jury communications, not external influence.

Resko, *supra*. In that case, the court circulated a questionnaire inquiring whether the jury had formed a premature opinion about the case; each of the 12 jurors responded by confirming a report of mid-trial juror discussions concerning the case, but denied that he or she had formed a premature opinion about the verdict. The trial resumed without further investigation. The court of appeals held that the district court erred in failing to inquire into the nature and extent of the discussions. 3 F.3d at 690-691. The court of appeals was further influenced by the fact that the trial judge had employed a questionnaire that the jurors completed outside the presence of any court personnel, thereby creating a potential for collaboration. *Id.* at 691.

In this case, unlike in *Resko*, the district court questioned each juror separately and outside the presence of the others; that provided the court an opportunity to observe the demeanor of the jurors and to ensure that there was no collaboration. In addition, in *Resko* the jurors all agreed that improper juror discussions had occurred; here only one juror indicated that there had been any discussions, and his answer was "extremely indefinite." Pet. App. A33 n.2. Finally, while the district court in *Resko* conducted no investigation into the nature of the discussions, the trial court's inquiry in this case established that there was no premature discussion of the defendants' guilt or innocence or their reputations. *Resko* therefore does not conflict with the decision in this case.[4]

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[4] Nor is there a conflict between the decision below and *United States* v. *Richman*, 600 F.2d 286 (1st Cir. 1979) (Pet. 35). There, the court held that when juror misconduct is alleged, the trial court should determine if the misconduct

2. Petitioner contends (Pet. 36-43) that the district court erred in asking the four jurors who had indicated that they had reached a decision whether they could change their opinion "if convinced it [was] erroneous." Pet. App. A26. He contends that the court's inquiry effectively shifted the burden of proof to the defense and suggested that the jury could acquit petitioner only if it concluded that a guilty verdict would be "erroneous."[5]

The district court's question was not reversible error. The trial court's inquiry did not purport to allocate or define the burden of proof; it merely inquired whether the jurors would be able to change their opinions, whatever they might be. Pet. App. A35. Moreover, the court's instructions repeatedly and clearly instructed the jury concerning the government's burden of proof. See *id.* at A36 n.3.[6] Jurors are of course presumed to follow their instructions (see *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)), and the court of appeals properly held that the question asked by the district court at mid-trial did

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occurred; evaluate whether any misconduct was prejudicial; and specify the reasons for its decision. *Id.* at 295. At the same time, however, the court explained that "[i]t is left to the discretion of the trial court to choose the extent and type of investigation required to resolve the question." *Ibid.* Here, the district court's investigation was sufficient to support its conclusion that the jury could reach a just and impartial verdict. Further, any inconsistency between *Richman* and the decision below does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[5] Petitioner did not propose an alternative question or instruction at trial. Pet. App. A35.

[6] The court of appeals counted ten references to the government's burden of proof in the jury charge. Pet. App. A36.

not serve to mislead the jurors regarding the burden or the required quantum of proof.

3. Petitioner contends (Pet. 44-50) that the photographic identification procedure used to obtain Portalatin's out-of-court identification of petitioner tainted Portalatin's in-court identification.

In *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977), this Court held that "reliability is the linchpin in determining the admissibility of identification testimony." Relying on *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), the Court explained that in making a reliability determination, courts should consider "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the time between the crime and the confrontation." *Manson* v. *Brathwaite*, 432 U.S. at 114. Those factors, in turn, are to be weighed against "the corrupting effect of the suggestive identification itself" in determining whether the identification testimony is admissible. *Ibid.*

Applying *Manson*, the courts of appeals first determine whether the identification procedure was impermissibly suggestive. They next consider the reliability of the identification by determining whether, in light of the five *Biggers* factors, the in-court identification was reliable despite the suggestiveness of the out-of-court procedure. See, *e.g.*, *McFadden* v. *Cabana*, 851 F.2d 784, 789-790 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989); *Dooley* v. *Duckworth*, 832 F.2d 445, 449-450 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988); *United States* v. *Bagley*,

772 F.2d 482, 494 (9th Cir. 1985), cert. denied, 475 U.S. 1023 (1986).

Applying the *Manson* test, the courts below correctly admitted Portalatin's identification testimony. The out-of-court identification procedure was not impermissibly suggestive. The prosecutor showed Portalatin a single photograph while debriefing him about a large conspiracy involving many people. The prosecutor in no way suggested that the person in the photograph was petitioner, and Portalatin's spontaneous identification of petitioner as "Hiram" was therefore reliable.

In any case, even if the identification procedure was impermissibly suggestive, Portalatin's in-court identification of petitioner was admissible. Portalatin observed petitioner for more than two hours while they drove the cocaine from the airstrip to petitioner's house. Moreover, without prompting by the prosecutor, Portalatin immediately recognized petitioner from the photograph and identified him by name. Accordingly, this is a case in which the in-court identification of the defendant clearly stemmed from the witness's personal knowledge of the defendant and not from any tainted identification procedure.

Petitioner complains (Pet. 47-50) that the court of appeals bypassed the first step of the *Biggers* analysis by ignoring the alleged suggestiveness of the identification procedure. The court of appeals, however, apparently assumed for the sake of argument that the photographic identification procedure was impermissibly suggestive. In analyzing petitioner's claim, the court indicated that "[t]he reliability of identification testimony allegedly tainted by reason of an impermissibly suggestive photograph should be resolved after

consideration of all the circumstances." Pet. App. A10-A11. It went on to find that the in-court identification was reliable because of Portalatin's opportunity to view petitioner at the time of the offense and because he spontaneously identified petitioner by name when he saw the photograph. *Id.* at A11. Although the court of appeals did not explicitly weigh those factors against any impermissible suggestiveness, the court's full consideration of the relevant factors is apparent from its discussion of all the circumstances.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In previous cases, the First Circuit explicitly weighed the *Biggers* factors against the suggestiveness of the identification procedure. See, *e.g.*, *Judd* v. *Vose*, 813 F.2d 494, 499 (1st Cir. 1987); *United States* v. *Bouthot*, 878 F.2d 1506, 1514 (1st Cir. 1989). There is no reason to assume that it departed from that approach here.